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Attorneys for Secured Creditors

VANGUARD MORTGAGE INVESTMENT, LLC; ENTRUST ADMINISTRATION, INC., FBO
BOB D'ALESSIO IRA ACCT #11002; CHESTER P. SOWINSKI, TRUSTEE OF THE
CHESTER P. SOWINSKI FAMILY TRUST DATED 5/3/96; and STEPHEN E. DIBBLE AND
LINDA L. DIBBLE AS TRUSTEES OF THE DIBBLE FAMILY TRUST DATED JULY 13,
1988

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEVADA

In re

ZUBIN PUGLIESE PLASENCIA,

Debtor.

Bk. No. 09-30276-lbr

Chapter 11

OPPOSITION TO DEBTOR'S MOTION TO
VALUE COLLATERAL, "STRIP OFF" AND
"CRAM DOWN" THE RIGHTS OF
UNSECURED CREDITORS FOR THE
PROPERTY ADDRESS LOCATED AT
16683 LYNN STREET, VICTORVILLE, CA
92395 PURSUANT TO 11 U.S.C. § 506(a)
AND § 1123

Date: January 6, 2010
Time: 9:30 a.m.

Secured Creditors VANGUARD MORTGAGE INVESTMENT, LLC; ENTRUST
ADMINISTRATION, INC., FBO BOB D'ALESSIO IRA ACCT #11002; CHESTER P.
SOWINSKI, TRUSTEE OF THE CHESTER P. SOWINSKI FAMILY TRUST DATED 5/3/96;
and STEPHEN E. DIBBLE AND LINDA L. DIBBLE AS TRUSTEES OF THE DIBBLE
FAMILY TRUST DATED JULY 13, 1988, the first trust deed holders on real property located at
16683 Lynn Street, Victorville, CA 92395, hereby submit the following objections to the Debtor's

1 *improperly noticed* Motion to Value Collateral. "Strip Off" and "Cram Down" the Rights of
2 Unsecured Creditors for the Property Address Located at **16683 Lynn Street, Victorville, CA**
3 **92395** Pursuant to 11 U.S.C. § 506(a) and § 1123.

4 1. These objecting Secured Creditors hold the first trust deed securing note in the original
5 amount of \$290,500.00 on real property generally described as **16683 Lynn Street, Victorville, CA**
6 **92395**. Debtor has been collecting rents from this property without court approval.

7
8 2. On or about **October 27, 2009**, Debtor filed the instant Chapter 11 Bankruptcy
9 proceeding in this Court. Debtor and his attorney failed to give notice to Secured Creditors of the
10 instant second bankruptcy. *Debtor has also not filed and served Movants with a motion to extend*
11 *the automatic stay pursuant to U.S.C. §362(c)(3).*

12 3. On **May 7, 2009**, Debtor filed the first Chapter 13 petition. case no. 09-17322-mkn.
13 Secured Creditors filed a Motion for Relief from Stay on June 16, 2009. On June 12, 2009,
14 Movant filed a proof of claim in the total amount of **\$334,965.39**. On July 7, 2009, Debtor filed
15 an Opposition to Secured Creditors' Motion for Relief and on July 13, 2009, Secured Creditors
16 filed a Reply to Debtor's Opposition. On July 13, 2009, Debtor filed an Objection to Claim 8-1
17 and Secured Creditors filed an Opposition to Debtor's Objection on August 11, 2009. The
18 Chapter 13 Trustee filed an Opposition to Confirmation of Plan Combined with Trustee's
19 Recommendation for Dismissal on June 22, 2009. Secured Creditors also filed an Opposition to
20 Debtor's Motion to Confirm First Amended Chapter 13 Plan on July 9, 2009, as Debtor
21 unsuccessfully attempted to strip Secured Creditors' lien in his Chapter 13 Plan. On October 2,
22 2009, that case was dismissed because Debtor was not eligible to file a Chapter 13.

23
24 4. Secured Creditors have elected to initiate foreclosure proceedings on the subject
25 Property with respect to the subject Trust Deed, and a Notice of Default and Election to Sell was
26

1 recorded on October 15, 2009. However, Secured Creditors are precluded from completing their
2 foreclosure action during the pendency of the instant bankruptcy case.

3 5. The Debtor is using cash collateral generated from the rental property securing Secured
4 Creditors' debt without the Court's permission in violation of Secured Creditor's loan instruments.
5 11 U.S.C. §363(c)(2) prohibits such unauthorized use of cash collateral. See Matter of Kain, 86
6 B.R. 506 (Bkrcty.W.D.Mich. 1988). See In re Tucson Industrial Partners, 129 B.R. 614 (9th
7 Circuit, 1991), vacated as moot 990 F.2d 1099 (9th Cir. 1993). The Tucson Industrial case, though
8 vacated, properly noted that in resolving questions concerning assignment of rents, that Arizona
9 statute A.R.S. §33-702 (B) is the relevant statute in determining this creditor's rights in Arizona
10 under 11 U.S.C. 363(1)(2).
11

12 6. Assignments of rent for security are treated as interests in real property. Secured
13 Creditors' interest in rents was properly perfected, in accordance with state law. on the date of
14 Debtor's bankruptcy and was not subject to avoidance under bankruptcy strong-arm statute, where
15 a deed of trust holder had recorded assignment in real property records as provided by statute. See
16 In re Scottsdale Medical Pavillion, 159 BR 295 (9th Cir. BAP 1993).
17

18 7. If the Court finds that the Debtor-in-Possession has failed to fulfill his statutory duty
19 under the Code to segregate cash collateral derived from the subject -property and that the Debtor
20 has spent cash collateral without Secured Creditors' or the Court's prior approval, Secured
21 Creditors request that this Court fashion an appropriate order against the Debtor for such
22 unauthorized use, if any, and prohibit further use of cash collateral by the Debtor. See In re
23 Williams, 61 B.R. 567 (Bkrcty. N.D.Tex. (1986)).
24

25 8. The valuation/appraisal submitted with an alleged value of \$71,500.00 by the Debtor is
26 not supported by a competent sworn declaration and consists solely of Debtor's counsel's

1 statement. Mr. Samuel A. Schwartz is not competent to testify about the value of the subject
2 property. As such, it contains inadmissible hearsay (FRE 801), and lacks foundation (FRE 602) as
3 follows:

4 (a) Counsel is attempting to testify as a witness to acts done by others. He is not
5 competent to do so. He cannot, and does not, allege personal knowledge sufficient to allow him to
6 testify to the facts alleged. Thus, the Debtor's Motion should be stricken in its entirety.

7 (b) In addition, Exhibit "B attached to the Debtor's Motion is likewise inadmissible, in
8 that counsel is not competent to testify to its authenticity [FRE 602 and FRE 901(a)].

9 Accordingly, any reference to the appraisal in the Debtor's motion should be stricken and the
10 motion denied on that ground alone, as the Debtor's motion is fatally defective.

11 9. Debtor lists the value of the subject property as only \$71,500.00. However, Movant
12 obtained a broker's price opinion for a considerably larger amount of \$95,000.00 on April 7, 2009.
13 It is Secured Creditors' contention that while admitted there is no equity for the Debtor in the
14 subject property, the value listed for this property by the Debtor's motion is grossly under the
15 actual current market value. The Debtor's motion has all the earmarks of a "rush job" intended to
16 revalue various lenders' liens without due process.

17 10. Secured Creditors further assert that the Debtor's alleged service of the Motion to
18 Value Collateral. "Strip Off" and "Cram Down" the Rights of Unsecured Creditors for the
19 Property Address Located at 16683 Lynn Street, Victorville, CA 92395 Pursuant to 11 U.S.C. §
20 506(a) and § 1123 fails to satisfy the requirements of Federal Rule of Bankruptcy Procedure
21 7004(b)(3) and due to this defect, Secured Creditors move the Court to strike that portion.

22 11. Debtor did not serve the purported Motion to Value Collateral in accordance with Rule
23 7004(b)(3). Service did not satisfy the requirements for adequate service upon Secured Creditors.
24
25
26

1 Rule 7004(b)(3) provides in relevant part:

2 "Except as provided in subdivision (h), in addition to the methods of service authorized by Rule
3 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage
4 prepaid as follows:
5 (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated
6 association, by mailing a copy of the summons and complaint to the attention of an officer, a
7 managing or general agent, or to any other agent authorized by appointment or by law to receive
8 service of process and, if the agent is one authorized by statute to receive service and the statute so
9 requires, by also mailing a copy to the defendant."

11 12. The purported service of the Motion to Value Collateral does not comply with the
12 requirement to serve the entire pleadings to the attention of an officer or other agent authorized as
13 provided in Rule 7004(b)(3). In In re Schoon, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993), the court
14 held that nationwide service of process by first class mail is a rare privilege which should not be
15 abused or taken lightly and, thus, the service has to be made to a specifically named officer.
16 "Where the alternative to service by mail is hiring a process server to serve the papers in person, it
17 seems like a small burden to require literal compliance with the rule." Schoon, 153 B.R. at 49; see
18 also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.), 180
19 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves
20 to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

21 23. Even a less strict interpretation of Rule 7004(b)(3), adopted by other courts, requires
22 more than the service reflected on Debtor's proof of service of the Motion to Value Collateral. In
23 Schwab v. Associates Commercial Corp. (In re C.V.H. Transport), 254 B.R. 331 (Bankr. M.D. Pa.
24 2000), the bankruptcy court ruled that a trustee's complaint could be properly served by addressing
25
26

1 it to the attention of an officer, managing or general agent, without specifically naming the
 2 individual officer or managing or general agent. See also Fleet Credit Card Services, L.P., v.
 3 Tudor (In re Tudor), 282 B.R. 546, 550 (Bankr. S.D. Ga. 2002).

4 14. Debtor's alleged service does not specify a person or even an officer of Vanguard,
 5 only one of their California attorneys. Further, Debtor's proof of service failed to state that a copy
 6 of the Motion to Value Collateral was mailed to Secured Creditors. *Instead the Debtor's proof of*
 7 *service lists service on Vanguard Funding as follows:*

9 Vanguard Funding
 10 Attention: Officer or Director
 11 Attention: Edward G. Schloss
 3637 Motor Ave., Suite 220
 12 Lcs Angeles, CA 90034.

13 Attorney Edward G. Schloss is neither an officer or director of Vanguard Funding, which is
 14 located in Anaheim, California. The service is insufficient under the plain wording of Rule
 15 7004(b)(3). See In re Villar, 317 B.R. 88 (9th Cir. BAP 2004). *Obviously, Debtor and his counsel*
 16 *of record are unfamiliar with the holdings of the Villar Court, which held that service on a*
 17 *creditor's attorney alone is fatally defective.* Accordingly, due to the insufficient service of
 18 process and notice the Court should strike the motion, or in the alternative, order the Debtor to re-
 19 serve and re-notice the Motion to Value Collateral in accordance with Rule 7004(b)(3).

20 CONCLUSION

21 Movant respectfully requests that this Court strike Debtor's motion as it is based on
 22 inadmissible statements by Debtor's counsel.

24 WHEREFORE, Secured Creditor prays as follows:

25 (1) That Debtor's Motion be stricken and dismissed.

26 (2) For attorneys' fees and costs incurred herein.

(3) For such other relief as this Court deems proper.

DATED: January 4, 2010



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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEVADA

In re

ZUBIN PUGLIESE PLASENCIA,

Debtor.

Bk. No. 09-30276-lbr

Chapter 11

CERTIFICATE OF SERVICE

Date: January 6, 2010
Time: 9:30 a.m.

On January 4, 2010, (date) I served the following documents(s) (specify):

OPPOSITION TO DEBTOR'S MOTION TO VALUE COLLATERAL, "STRIP OFF" AND
"CRAM DOWN" THE RIGHTS OF UNSECURED CREDITORS FOR THE PROPERTY
ADDRESS LOCATED AT 16683 LYNN STREET, VICTORVILLE, CA 92395 PURSUANT
TO 11 U.S.C. § 506(a) AND § 1123

I served the above-named document(s) by the following means to the persons as listed
below:

(Check all that apply)

☒ a. ECF System (You must attach the "Notice of Electronic Filing", or list all persons and
addresses and attach additional paper if necessary)

1 Nikoll Nikci, nik@schwartzlawyers.com
2 Samuel A. Schwartz, sam@schwartzlawyers.com
3 U.S. Trustee – LV - 11, USTPRegion17.lv.ecf@usdoj.gov

- 4 ■ **b. United States mail, postage fully prepaid**
5 *(List persons and addresses. Attach additional paper if necessary)*

6 **Debtors:**
7 **Zubin Pugliese Plasencia**
8 **452 East Silverado #346**
9 **Las Vegas, NV 89183**

- 10 ☐ **c. Personal Service** (List persons and addresses. Attach additional paper if necessary)

11 I personally delivered the document(s) to the persons at these addresses:

- 12 ☐ For a party represented by an attorney, delivery was made by handing the document(s) to
13 the attorney's office with a clerk or other person in charge, or if no one is in charge by
14 leaving the document(s) in a conspicuous place in the office.

- 15 ☐ For a party, delivery was made by handing the document(s) to the party or by leaving the
16 document(s) at the person's dwelling house or usual place of abode with someone of
17 suitable age and discretion residing there.

- 18 ☐ **d. By direct mail (as opposed to through the ECF System)**

19 *(List persons and email addresses. Attach additional paper if necessary)*

20 Based upon the written assignment of the parties to accept service by email or a court
21 order. I caused the document(s) to be sent to the persons at the mail addresses listed below. I did
22 not receive, within a reasonable time after the transmission, any electronic message or other
23 indication that the transmission was unsuccessful.

- 24 ☐ **e. By fax transmission**

25 *(List persons and fax numbers. Attach additional paper if necessary)*

26 Based upon the written assignment of the parties to accept service by fax transmission or a

1 court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was
2 reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

3 ☐ f. By messenger

4 *(List persons and addresses. Attach additional paper if necessary)*

5 I served the document(s) by placing them in an envelope or package addressed to the persons
6 at the addresses listed below and providing them to a messenger for service.

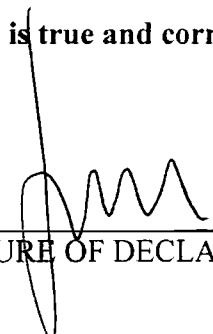
7 *(A declaration by the messenger must be attached to this Certificate of Service).*

8 **I declare under penalty of perjury that the foregoing is true and correct.**

9
10 Signed on (date): January 4, 2010

11 Jamie Miller

12 (NAME OF DECLARANT)

13 
14 (SIGNATURE OF DECLARANT)

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